BRIEF IN SUPPORT.

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia will be found beginning at page 20 of the record herein. It has not yet been officially reported, except in the Washington Law Reporter, 68 W. L. R. 714.

Jurisdiction.

The decision of the United States Court of Appeals for the District of Columbia was rendered on May 6, 1940 (R. 20). The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. A., Sec. 347 (a).

Question Presented.

The question presented is stated in petition (*supra*).

Specification of Errors.

The United States Court of Appeals for the District of Columbia erred in holding that respondent was immune from liability for the negligence of its agent while aiding in the apprehension of a criminal at the direction of a police officer and in holding that rendering such aid is in law an abandonment of the employment.

ARGUMENT.

I. Importance of Question Presented.

The decision herein sought to be reviewed does fall within the provisions of Rule 38 of this Court. Although that part of the question involved relative to the statute cited applies to the District of Columbia alone, the decision affects public peace officers throughout the United States, including all classes of Federal law enforcement officers. Although the statute cited is purely local, it is declaratory of the general

common law and would therefore be applied nationally when a similar question is again presented.

Insofar as the District of Columbia is concerned the problem presented is an important one covering a great number of police officers, both of the municipality and of the Federal government.

The police department of the District of Columbia has a personnel consisting of 1432 policemen. The White House police number 82 men. The Capitol police number 61 men. (2 U. S. C. A. Sec. 60 (a)). The United States Park Police have 80 men. Police are also employed by the Bureau of Indian Affairs (25 U. S. C. A. Sec. 13).

The White House police "possess privileges and powers and perform duties similar to those of the members of the Metropolitan Police of the District of Columbia and such additional privileges, powers and duties as the President may prescribe." (Act of September 14, 1922, c. 308, sec. 1, 42 Stat. 841, 3 U. S. C. A. Sec. 61.)

The Capitol police are likewise authorized to detail police from the House and Senate Office Buildings. (Act of May 17, 1938, as amended 52 Stat. 381, 2 U. S. C. A. Sec. 60 (a).)

Not only does the question herein apply to those designated police employees of the local government of the District of Columbia and of the Federal government, but it likewise affects the rights, liabilities and incidents of the conduct of the entire constabulary and police force in the United States numbering 169,240 men. (15th Census of U. S., 1930, Vol. IV, p. 14.) Federal law enforcement officers also include United States marshals, Secret Service, Narcotics, Alcohol and Customs Officers, Immigration and Postal inspectors and special agents of the Federal Bureau of Investigation, amongst others.

In none of the States has there been any denial of the common law rule as to the powers of police as announced by the District of Columbia Code.

On many recent occasions questions arising in this Court under Acts of Congress restricted in their operation to the District of Columbia have been held to have more than mere local significance.

Washington Fidelity Nat'l Ins. Co. v. *Burton,* 287 U. S. 97, 77 L. Ed. 196;
Reichelderfer v. *Quinn,* 287 U. S. 315, 77 L. Ed. 331;
U. S. ex rel. Greathouse v. *Dern,* 289 U. S. 352, 77 L. Ed. 1250;
Loughran v. *Loughran,* 292 U. S. 216, 78 L. Ed. 1219;
Davis v. *Davis,* 305 U. S. 32, 83 L. Ed. 26.

In several cases this Court has reviewed on certiorari common law questions decided by the United States Court of Appeals for the District of Columbia and has reversed those decisions.

Gunning v. *Cooley,* 281 U. S. 90, 74 L. Ed. 720;
Aldridge v. *U. S.,* 283 U. S. 308, 75 L. Ed. 1054;
Reed v. *Allen,* 286 U. S. 191, 76 L. Ed. 1054;
Best v. *D. C.,* 291 U. S. 411, 78 L. Ed. 882.

In any view of the scope of the problem presented by the case at bar it cannot be regarded as a problem of purely local concern. Since there is no other Federal case in point, the probability of precedent created by the decision below, likely to be followed in later cases, necessitates a review by this Court to settle the law.

II. The Effect of Being Commandeered by the Police.

The duty of private individuals to aid in the apprehension of criminals antedates all American statutes.

Polloock and Maitland, History of English Law, Vol. 2, p. 580.

The fact of the existence of danger does not at common law justify the refusal of a citizen to render aid.

It is stated in *Dougherty* v. *State,* 106 Ala. 63, as follows:

> "Obedience to such a summons, because it involves danger, cannot be refused by the private citizen, any more than the duty to make the arrest can, for the same reason, be declined by the officer. The fact that there is danger involved is the very thing which calls for and makes obedience a duty."

The statute in the District of Columbia, Title 20, Sec. 487 (1929 Code) is merely declaratory of the common law as to the powers of police officers, with the consequent duty on the part of the public to obey.

4 Am. Jur. 17, Sec. 24.

The violation of the duty to obey constituted a crime at common law.

2 R. C. L. 491.

8 L. R. A. (N. S.) 535, Note.

It is thus not disputed in the present case that such is the duty. Respondent contended successfully below that such compliance with duty by an employee *ipso facto* destroyed the master-servant relationship. This conflicts with the only authority directly in point, relied upon below by petitioner and considered authoritative by the dissenting opinion of Mr. Justice Rutledge.

Babington v. *Yellow Taxi Corp.,* 250 N. Y. 14, 164 N. E. 726. In an opinion by Mr. Justice Cardozo, it was there said:

> "Babington was in charge of the cab, and could not desert it without peril to his master's interests. The fact that, while protecting it for his master, he used it incidentally to preserve the public peace, was not such a departure from the course of duty as to constitute an abandonment of the employment, even if it be assumed that the direction of the officer was not a binding order."

In referring in that case to the positive duty to obey, with both the servant's person and the master's property, Mr. Justice Cardozo said:

> "The horse has yielded to the motorcar as an instrument of pursuit and flight. The ancient ordinance abides as an interpreter of present duty. Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand. The incorporeal being, the Yellow Taxi Corporation, would have been bound to respond in that spirit to the summons of the officer if it had been sitting in the driver's seat. In sending Babington upon the highway, it knew, or is chargeable with knowledge, that man and car alike would have to answer to the call. An officer may not pause to parley about the ownership of a vehicle in the possession of another when there is need of hot pursuit. Insofar as the danger of pursuit was a danger incidental to the management of the car, it was one of the risks of the employment, an incident of the service, foreseeable, if not foreseen, and so covered by the statute."

After referring to the *Babington* case, Mr. Justice Rutledge, in his dissent below, said:

> "A fortiori it was true, if the order was binding as here. It would be a strange rule which would require a man or a company to contribute his or its property and his personal services to the public protection and welfare, yet would exempt both from making available the services of their employees. In practical effect, this would exempt corporations from any obligation whatever to render personal service, since they can act only vicariously. It would throw the primary responsibility for discharging the duty upon the employee rather than the employer and disregard the servant's obligation to his master to remain with and protect its property to the fullest extent consistent with the emergency

> throughout its continuance. Such a consequence also ignores the fact that the summons is directed to car and driver, not merely to the employee as a passerby disconnected from and unrelated to the function of driving the vehicle of which he has charge."

The following additional authorities tend to sustain the position of the petitioner as to the duty to respond to the call of the police and the consequent effect thereof. These cases do not, however, involve the effect upon the master-servant relationship.

Jones v. *Melvin*, 293 Mass. 9, 199 N. E. 392;

Schluraff v. *Shore Line Motor Coach Co.*, 269 Ill. App. 569;

Oxford v. *Purity Bakeries Corp.*, 112 N. J. L. 594, 115 N. J. L. 166, 178 A. 788;

Sackett v. *Masonic Protective Association*, 106 Neb. 238, 183 N. W. 101.

In *Jones* v. *Melvin*, *supra*, decided by the Supreme Judicial Court of Massachusetts in 1936, plaintiff was riding as a guest in an automobile operated by the defendant. The automobile was commandeered by a police officer to chase a law violator. Defendant drove at a high rate of speed, struck a curb and injured the plaintiff. Plaintiff's evidence established gross negligence of the defendant host as required by the Massachusetts rule. In holding the defendant liable the court held that the defendant did not surrender the operation and control of the automobile to the police officer, and even though he submitted to the orders of the police officer the defendant was still in control of its operation and his duty of care to the plaintiff was not destroyed by the direction of the police officer. Whether control was surrendered to the police was a question for the jury.

No evidence was offered below which could possibly support a claim that the control of respondent's truck had been

relinquished to the police. The police did no more than to direct the chase. None of the elements as to control of operation was shown to have been transferred to the police.

The manner of execution of the officer's original direction was solely within the control of the defendant's agent. Submission by the agent to the original direction to enter the chase, without more, did not produce a transfer of agency from the defendant to the police officer or to the municipality. Had the agent himself been sued he would not have been entitled to exoneration, as a matter of law, because he was assisting in the apprehension of a criminal. The agent's liability under the circumstances is not to be differentiated from the liability of his corporate master. If the corporate entity itself can be imagined to have been behind the wheel of the truck, its liability cannot be lessened by the fact that the act was executed by its agent, who was required by law to comply with the direction of the officer under the circumstances. The duty imposed upon the respondent did not arise out of contract. It arose as a nondelegable legal duty not related to assent or dissent. The duty is positive and is as binding upon the corporation as upon its agent. Considerations of public policy strongly support this view. Difficulties incident to the extent of necessary proof present different questions not here involved.

III. The court below improperly applied Denton v. Yazoo and Mississippi R. R., 284 U. S. 305, 76 L. Ed. 310.

In the *Denton* case plaintiff sustained personal injuries as a result of the negligence of a porter who was assisting a United States mail clerk in loading mail onto a railroad car. The porter was an employee of the railroad and his salary was paid by it. This Court there held the railroad not liable because the porter had been put under the control of the mail clerk. The court below held that the *Denton*

case established a principle of insulation of a master from liability because the servant was doing work beneficial to another. The majority opinion below recognizes that "It is true that the railroad's duty was created by a contract and the Star's supposed duty was not * * *. It is urged that it was the driver's duty not only to the public, but the Star, to submit to the policeman's order. Even if that were true, it would not make the Star liable. In the *Denton* case it was the porter's duty to the railroad to submit to the postal clerk's order."

In commenting on the *Denton* case, as not properly applicable to the case at bar, it was said in the dissenting opinion of Mr. Justice Rutledge, as follows:

> "In my view, therefore, cases like Denton v. Yazoo & Mississippi R. R., 284 U. S. 305 (1932), relied upon by the majority, and others involving exchange of masters temporarily in private business or in the conduct of proprietary functions by government, such as handling the mails, are not in point. There the duty of the carrier arose from and was defined by the contract with the government. As the court construed the contract, it limited the duty to furnishing the man to do something the carrier was in no way obligated to do apart from the contract or by it. The duty being so created and limited, the carrier was neither obligated to do the work in the course of which the injury occurred nor responsible for the way in which it was done. The case therefore involved merely an application of the ordinary principles of respondeat superior as developed in the law of private agency. This is not such a case. Here the duty is not contractual and therefore not confined in scope by contractual limitations concerning what it includes. It is rather a nondelegable public duty imposed by operation of law directly upon the corporation itself, regardless of its assent and incapable of negation or limitation by private contract or dissent. It exists because the law required the corporation, as it does all other citizens, to

aid the officer 'to enforce the justice of the state. . . . (as) if it had been sitting in the driver's seat.' That duty exists not merely before and up to the very moment the chase begins, but while it continues. It is contemporaneous and coextensive with the officers need for aid. That is the duty imposed upon individuals; it is no more to ask of corporations than it is to demand of them. To ask less would be to exempt corporations from a duty and a liability which it is as reasonable and practical for them to bear as it is for individuals, and reciprocal to which they receive like benefits. As with the individual citizen, the corporation's duty is not merely 'to furnish' services to be used by another in doing something in which the corporation has no further interest. Its protection comes, as does the individual citizen's, from the enforcement of the 'justice of the state', not merely from the preparation, or furnishing of facilities, to enforce it. If the duty is reciprocal to the benefit it cannot stop when the crucial stage begins. The case, therefore, is not one in which analogies drawn to duties created by private contract and the law of private agency are controlling."

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari is within the provisions of Rule 38 of this Court; that the nature of the problem presented is one of widespread importance in which this Court should exercise its power of review to settle the legal questions involved. It is, therefore, respectfully urged that a writ of certiorari should be granted.

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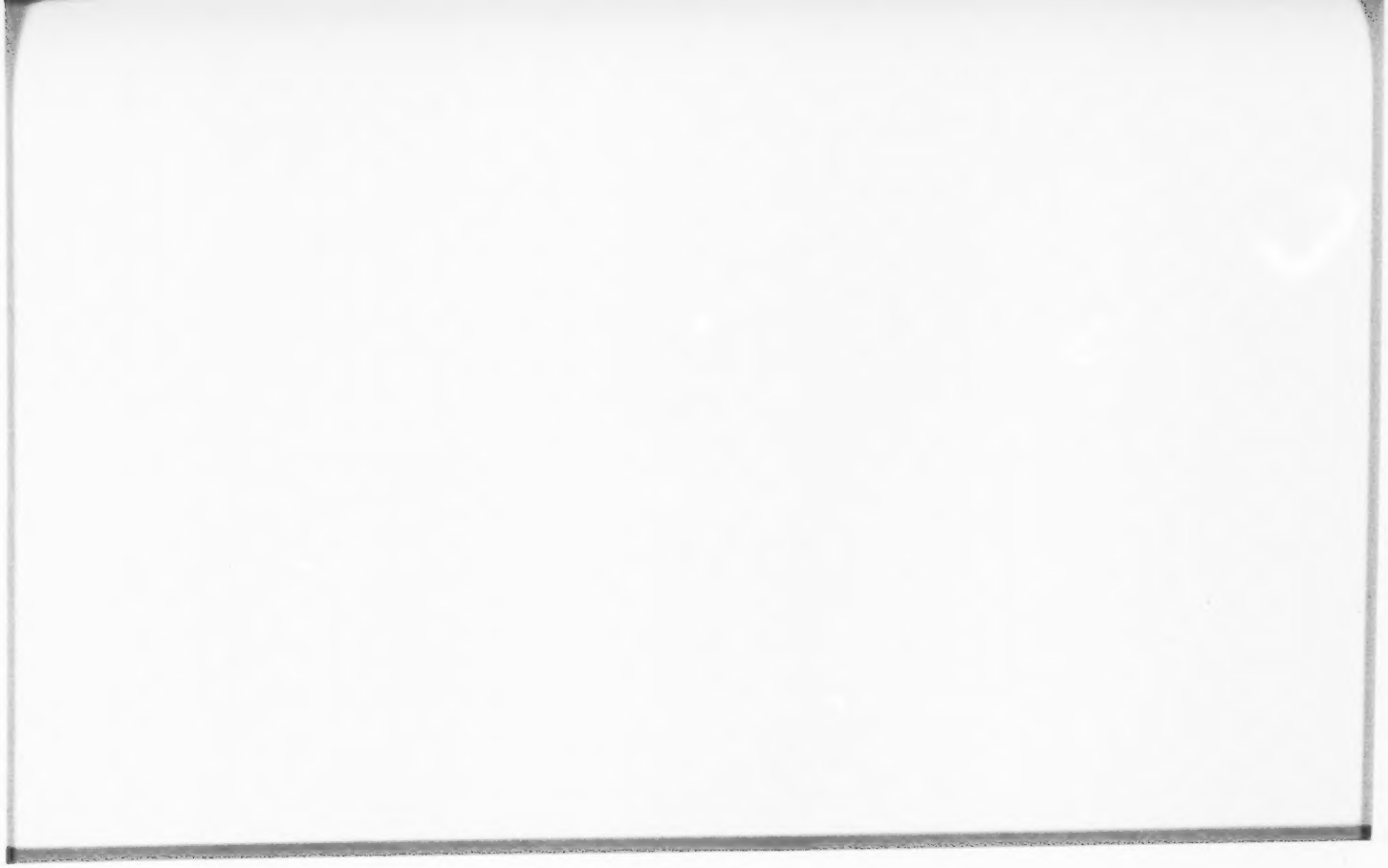
(9181)

BRIEF FOR THE RESPONDENTS IN OPPOSITION



SEP 10 1940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 302.

PETER BALINOVIC, *Petitioner*,

v.

THE EVENING STAR NEWSPAPER COMPANY, A Corporation, *Respondent*.

On Petition for a Writ of Certorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT IN OPPOSITION.

EDMUND L. JONES,
GEORGE MONK,
Counsel for Respondent.

Washington, D. C.,
September 10, 1940.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia was rendered May 6, 1940, (R. 20) and has not yet been officially reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on May 6, 1940, (R. 34). The petition for the writ of certiorari was filed August 3, 1940. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. section 347 (a).

STATEMENT OF CASE.

This case involved an action originally filed by the petitioner against the respondent in the District Court of the United States for the District of Columbia to recover damages for personal injuries alleged to have been sustained by the petitioner (hereinafter referred to as plaintiff) in an alleged collision with a truck (hereinafter referred to as the Star truck) owned by the respondent (hereinafter referred to as defendant).

This claim grew out of an accident which occurred on June 23, 1933. At the time of and immediately prior to this accident plaintiff, a laborer employed by the District of Columbia in the Public Parks Division, was seated on the left side of the rear part of a District of Columbia truck. Plaintiff's feet were hanging over the side. This truck was facing north on 14th Street, S. W. at or near its intersection with Water Street. At that time a yellow roadster speeded south on 14th Street from the direction of Pennsylvania Avenue towards Virginia, passing the District of Columbia truck at Water Street.

The yellow roadster was being pursued by a taxicab commandeered by Officer Comingore of the Metropolitan Police Force of the District of Columbia, and then by the Star truck which had been commandeered by Officer Cash of the Metropolitan Police Force of the District of Columbia for the purpose of pursuing a law violator.

The plaintiff in his declaration alleged that by reason of certain acts of negligence on the part of the driver, the Star truck collided with the plaintiff (R. 1-4).

The defendant's plea set up the following defenses (R. 4-6):

1. That there was no negligence on the part of the driver of the Star truck;

2. That the plaintiff was barred from recovery by reason of his own negligence;

3. That the Star truck had been commandeered by a police officer of the District of Columbia who had taken entire

control and charge of the Star truck and ordered the driver to follow the yellow roadster, and that the Star truck was not under the control or authority of the defendant or engaged in any way in the defendant's business.

4. That the Star truck did not in any way collide with the plaintiff's legs or any other part of plaintiff's body, and that his injuries were caused by some vehicle not belonging to, owned or operated by the defendant.

The driver of the Star truck, Eugene Parham, testified (R. 14, 15) that in June of 1933 he was employed by the defendant as a truck driver; that on the afternoon of June 23, 1933, he was driving the Star truck with a load of newspapers on his route; that his route led from the Star Building at 10th and Pennsylvania Avenue, N. W., along Pennsylvania Avenue to his first stop at 29th Street and Pennsylvania Avenue, N. W., then to 35th Street and Wisconsin Avenue, N. W., then to Foxhall Village, then to Spring Valley and Wesley Heights, and then directly back to the Star Building; that as he was proceeding west on Pennsylvania Avenue enroute to his first stop at 29th Street and Pennsylvania Avenue just before he came to 15th Street, N. W., the traffic signal operated by a police officer was against traffic moving south on 15th Street; that a yellow roadster went through the signal; that a police officer jumped on his truck and said to "go after that car"; that Parham turned left on 15th Street toward the District Building, went completely around the District Building, then left at 14th Street, and then south on 14th Street to Long Bridge; that the Star truck continued the chase to the entrance of Arlington Cemetery; that during the entire chase the police officer stood on the left running board of the Star truck; that the Star truck did not collide with any vehicle at 14th and Water Streets or at any other place during the chase; that the Star truck was going between 35 and 40 miles per hour down 14th Street and across Water Street; that going down 14th Street, the Star truck was driven on the right hand side of the south-bound car trucks; that as the Star

truck crossed Water Street, it was on the right of the center line of 14th Street; that the Star truck was at no time on the wrong side of the street; that during the pursuit the taxicab was about a block and one-half in front of the Star truck and the yellow roadster was about the same distance ahead of the taxicab; that Parham had no personal knowledge of the Star truck's hitting the plaintiff.

Officer John J. Cash testified (R. 15, 16) that at about 3 p. m. on June 23, 1933, he was directing traffic at 15th Street and Pennsylvania Avenue, N. W.; that he had noticed a certain yellow roadster driving by this intersection several weeks previously; that he had looked up the record of the owner of this yellow roadster and found that the operator had been involved in an accident in which three people were killed, and that the operator had no permit; that while he was directing traffic at this time, the yellow roadster approached moving south on 15th Street; that Officer Cash gave a signal to stop, but the yellow roadster proceeded on against the signal; that he "commandeered" the Star truck which was the nearest vehicle and proceeded after the yellow roadster; that he stood on the left running board of the Star truck during the entire pursuit; that the Star truck struck nothing at Water Street or at any other time or place; that the Star truck was on the right hand side of the street and was not going very fast.

There was also other testimony with reference to the accident and to the operation of the Star truck (R. 9-16).

At the close of all the testimony the defendant moved for a directed verdict on the following grounds (R. 17):

1. The defendant was not liable as a matter of law for injuries to the plaintiff caused by the negligence of the driver of its truck which had been commandeered by a District of Columbia police officer for the purpose of pursuing a law violator.

2. There was no negligence under the circumstances on the part of the driver of defendant's truck.

Upon request of counsel for plaintiff (R. 17) the Court submitted to the jury certain interrogatories inquiring whether defendant's truck struck the plaintiff; whether defendant's truck driver was negligent in the operation of the truck; whether the plaintiff was guilty of contributory negligence, and what was the amount of plaintiff's damages. The jury reported that it was unable to agree, and the jury was thereupon discharged.

The trial judge then directed the jury to return a verdict for the defendant on the first ground of defendant's motion, and announced that he was not ruling on the second ground.

Plaintiff then appealed to the United States Court of Appeals for the District of Columbia from the judgment entered on the verdict directed for defendant by the trial judge.

On May 6, 1940, this judgment was affirmed by the United States Court of Appeals for the District of Columbia (R. 34).

ARGUMENT.

I.

The Decision of the United States Court of Appeals for the District of Columbia does not involve a question of general importance.

The question of law decided below relates only to a small phase of the doctrine of *respondeat superior*. Is the master of an automobile driver who has been commandeered by a District of Columbia policeman to assist in pursuing a law violator liable in damages to a third person for injury caused by the negligence of the automoible driver during the pursuit? That alone defines the scope of the decision below. The rights and duties of the police officer were not passed on; the rights and duties of the automobile driver who had been commandeered were not passed on; and neither were those of the person pursued. Thus, the only question considered was whether a general employer is

liable for the acts of a servant who has passed completely from his control to that of another. Both the District Court of the United States for the District of Columbia and the United States Court of Appeals for the District of Columbia decided that under the circumstances of this particular case and under the decisions applicable in the District of Columbia there was no liability on the part of the general employer.

The liability of the employer of an automobile driver in a situation of this kind is not of federal concern and is dependent entirely on the substantive law of the place where the accident happened. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. In this case there is no constitutional or other federal matter involved, and the question is purely one of local District of Columbia law as applied and determined by the District of Columbia courts in their capacity as local courts for the District of Columbia.

II.

The decision below does not involve a question of substance relating to a statute of the United States.

The petitioner is attempting to secure a review by this Court on the ground that the question involved presents the construction of the Act of Congress (Title 20, Section 487 of the Code of Laws for the District of Columbia, Act of June 11, 1878, 20 Stat. 107, c. 180, sec. 6; quoted on page 3 of the petition herein) relating to the power of police officers. The decision, however, has little, if any, relationship to this statute which is entirely local to the District of Columbia and merely declaratory of the common law.

This statute only provides that members of the District of Columbia police force shall possess in the District of Columbia all the common-law powers of constables (with several irrelevant exceptions). By reason of this the petitioner contends that the policeman in question had the right to commandeer respondent's driver, and that consequently

the respondent was liable to the petitioner as a result of the injuries received by him. Petitioner overlooks the fact that the respondent does not even try to base its defense on the police officer's lack of power under the statute or otherwise to commandeer, and also overlooks the fact that the majority opinion does not in any respect negative, limit, or define the authority of a police officer to call upon other citizens to assist in an arrest. On the contrary, the more authority that the policeman had over respondent's driver under the statute, the more completely the driver passed from respondent's control to that of the officer and the less likelihood of liability on the part of respondent.

The statute pertains to the powers of District of Columbia policemen; the question involved in this case pertains to the liability of an employer whose employee has been commandeered by a District of Columbia policeman. The powers of District of Columbia policemen are not fixed, limited, or determined in any way by the opinion of the lower court. Whether or not the officer had legal authority under the statute to commandeer the driver is immaterial. In either event, the driver had wholly abandoned his employment by departing from his designated route to engage in an activity not connected with respondent's business, and had passed completely from respondent's control to that of another.

As the opinion below does not even effect the powers of District of Columbia policemen under the statute or otherwise, it is difficult to understand how petitioner can contend (pages 5 and 6 of his brief) that the opinion effects the powers of other federal and peace officers throughout the United States, the powers of whom are defined by other and different statutes not now before the Court.

III.

An opinion in this case does not and would not settle the law in the District of Columbia as it now stands, but only as it stood prior to the District of Coumbia Automobile Financial Responsibility Act enacted in 1935.

In view of statutory change in the local District of Columbia law since the time of this accident, the opinion below is at the present time to a large extent only academic insofar as settling the law is concerned.

Title 6, section 255b, Supp. V of the Code of Laws for the District of Columbia (1929) (Act of Congress May 3, 1935, 49 Stat. 167, c. 89, section 3) provides as follows:

> "Whenever any motor vehicle, after the passage of sections 255-255c hereof, shall be operated upon the public highways of the District of Columbia by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall, in case of accident, be deemed to be the agent of the owner of such motor vehicle, and the proof of the ownership of said motor vehicle shall be prima facie evidence that such person operated said motor vehicle with the consent of the owner."

As this statute was enacted two years after the accident, it has no bearing on the decision in this particular case. It would be of considerable importance, however, in the determination of a similar case happening since the effective date of the statute. Under the common-law in force at the time of the accident in this case the question, whether the owner of an automobile was responsible for the negligence of the driver, depended entirely on whether, under the ordinary principles of *respondeat superior,* the driver was engaged in the business and subject to the control of the owner. At the present time, however, by virtue of the statute quoted above, the liability of an automobile owner for the negligence of the driver depends only on whether the driver is operating with the consent of the owner. If so, the owner is

liable even though the driver is a gratuitous bailee operating the car for his own personal pleasure or business with no master-servant relationship between him and the owner. Consequently, if the petitioner's accident had occurred this year instead of in 1933, the liability of the respondent would have been governed by entirely different principles.

IV.

The question of law involved was decided correctly below, in accordance with the District of Columbia law and decisions, and in accordance with the decisions of this Court.

A.

THE DEFENDANT IS NOT LIABLE FOR THE INJURIES TO THE PLAINTIFF ALLEGED TO HAVE BEEN CAUSED BY THE NEGLIGENCE OF DEFENDANT'S DRIVER WHO HAD BEEN COMMANDEERED BY A DISTRICT OF COLUMBIA POLICE OFFICER FOR THE PURPOSE OF ARRESTING A LAW VIOLATOR.

The undisputed, uncontradicted, and unimpeached evidence shows that the said driver at the time of the accident had completely departed from his designated route and at the command of a police officer was engaged in assisting that officer in attempting to make an arrest. As the police officer had authority to commandeer the driver, the complete control over the driver passed, legally as well as in fact, to the police officer, an employee of the District of Columbia.

In a sense, the driver was actually a temporary employee of the District of Columbia. It has been held in a number of cases that a person assisting a police officer to make an arrest becomes for the time being an employee of the same governmental agency as the police officer. *Monterey Co.* v. *Rader,* 199 California 221, 248 Pac. 912 (1926); *Tomlinson* v. *Town of Norwood,* 208 N. C. 716, 182 S. E. 659 (1935); *Mitchell* v. *Industrial Commission of Ohio,* 57 Ohio App. 319, 13 N. E. (2d) 736 (1936); *West Salem* v.

Industrial Commission, 162 Wis. 57, 155 N. W. 929 (1916); *Vilas Co.* v. *Monk*, 200 Wis. 451, 228 N. W. 591 (1930).

In the present case, the driver had ceased to be a servant of the defendant and had become a servant of the police officer or the District of Columbia. The police officer had authority to transfer the driver from the business and control of defendant to his own business and control when proper and necessary. Although in this case the defendant had not lent or hired out the driver who had been taken without defendant's knowledge or consent, the defendant was at most in the nature of merely a general employer whose employee had been turned over to a special employer. Even if defendant remained the general employer of the driver, it would not be liable because the proper test for determining which employer is liable for the servant's negligence is "whose work was being performed, and who had the power to control and direct the servant in the performance of that work." *Western Marine & Salvage Co.* v. *Ball*, 59 App. D. C. 208, 211; 37 F. (2d) 1004 (1929). See also *Denton* v. *Yazoo and M. V. R. Co.*, 284 U. S. 305 (1932); *Phelps* v. *Boone*, 62 App. D. C. 308, 67 F. (2d) 574 (1933) (certiorari denied 291 U. S. 677); *Higgins* v. *Western Union Telegraph Co.*, 156 N. Y. 75, 50 N. E. 500 (1898).

In the case of *Denton* v. *Yazoo and M. V. R. Co.*, 284 U. S. 305, one Hunter, who had been hired and was paid by the Illinois Central Railroad Company, was at the time of the accident engaged in loading United States mail into a mail car under the direction of a United States postal transfer clerk. This Court applied the same rule as applied by the United States Court of Appeals for the District of Columbia in the case of *Western Marine & Salvage Co.* v. *Ball, supra*, holding that the defendant railroad company was not liable for personal injuries to a third person resulting from the negligence of Hunter while he was engaged in loading the mail because his work at the time was work of the government under the control of a governmental agent.

In the *Denton* case there was involved a statute requiring the general employer to furnish men to work under the direction of a government employee for the purpose of performing a governmental function. In the present case, there was involved only a common-law duty on the part of the individual servant himself to work under the direction of a government employee for the purpose of performing a governmental function. Certainly, if the railroads were not liable in the *Denton* case, the defendant herein is not liable.

The majority opinion below relies on the *Denton* case as one of its principal authorities. The dissenting opinion below seeks to distinguish the *Denton* case from the present case on the theory that the duty of the railroad was a contractual duty, whereas "here the duty is not contractual and, therefore, not confined in scope by contractual limitations concerning what it includes" (R. 32). It is respectfully submitted that the obligation of the railroad in the *Denton* case was not contractual but statutory. Consequently, even on the basis of the distinction suggested in the dissenting opinion, the *Denton* case involved application of the same principles of *respondeat superior* as involved in this case.

The minority opinion below stresses the fact that defendant was a corporation. The problem, however, is simply one of the proper application of the principles of *respondeat superior*. The respondent's liability should be determined on the same basis as the liability of an individual person occupying a similar position as the general employer of a commandeered driver. When the officer took charge, the driver was no longer performing the business, or acting under the control, of the general employer, and that employer, whether corporate or individual, should be relieved of liability for the negligence of the driver.

The case of *Babington* v. *Yellow Taxi Corporation*, 250 N. Y. 14, 164 N. E. 726, 61 A. L. R. 1354 (1928), while of interest, is no authority for imposing liability on the defen-

dant in the present case. In the *Babington* case a police officer jumped on the running board of a taxicab and ordered the driver to chase another car. During the chase the taxicab driver was killed. The Court held that under the New York Workmen's Compensation Act, the dependents of the taxicab driver were entitled to compensation. The Court, however, said in that case (page 18):

> "The question is not here whether the employer would be liable to third persons injured in the chase, and, if so, to what exent. Negligence would certainly be relative to the need and the occasion: a speed too great at other times is proper in emergencies. Conceivably the employee would be deemed to have passed out of the service of his general employer and into the service of a special one. We leave the question open, not meaning to express, even by intimation, an opinion as to the answer. The general employer is still liable under the provisions of the statute. *Matter of De Noyer* v. *Cavanaugh*, 221 N. Y. 273."

As is evident, the *Babington* case was decided under a workmen's compensation statute. It is hardly necessary to mention that such statutes are designed to protect workmen and their dependents from the results of injuries received while working, regardless of negligence, and that such statutes are for reasons of public policy very liberally construed in favor of the employees whenever possible to do so without causing obvious injustice to employers.

Moreover, the New York Workmen's Compensation Act, unlike statutes in some of the other states, imposes liability upon a general employer even though the employee has passed under the control of a special employer. *Matter of Dale* v. *Saunders*, 218 N. Y. 59, 112 N. E. 571 (1916). Thus, at least in New York, a general employer may be held liable under the Compensation Act even though the general employer would not be liable under the doctrine of *respondeat superior*. There is considerable merit in holding liable under compensation statutes the employer who has contracted

with and who pays the wages to the employee even though the employee at the time of the accident is working for and under the control of a special employer. This, however, need not and should not impose liability upon the general employer for injury to third persons as a result of the servant's negligence.

The Star truck, unlike the taxicab in the *Babington* case, was obviously not a vehicle for hire but was a truck operated by defendant on a designated route and not subject to the instructions of any third person. The alleged accident occurred in a place far off this designated route. Unlike the taxicab driver, the defendant's driver did not operate on a roving commission for the purpose of conveying for hire to any place, at any time, any person who might board the vehicle.

B.

THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF DEFENDANT'S DRIVER UNDER THE CIRCUMSTANCES.

The defendant's motion for a directed verdict was based on the following two grounds (R. 17):

1. That the defendant was not liable as a matter of law for injuries to the plaintiff caused by the negligence of the driver of its truck which had been commandeered by a District of Columbia police officer for the purpose of pursuing a law violator;

2. There was no evidence of negligence under the circumstances on the part of the driver of defendant's truck.

Although the trial judge stated that he based his decision on the first ground without ruling on the second ground, the judgment for defendant entered upon the directed verdict should be affirmed if either ground of the motion is correct. *Howes* v. *District of Columbia,* 2 App. D. C. 188 (1894); *Wilkins* v. *McGuire,* 2 App. D. C. 448 (1894); *Maxwell* v. *Brayshaw,* 49 App. D. C. 57, 258 Fed. 957 (1919); *Lewis-*

Hall Iron Works v. *Blair,* 57 App. D. C. 364, 23 F. (2d) 972 (1928); *Fay* v. *Doyle,* 68 App. D. C. 199, 95 F. (2d) 110 (1938).

It is the contention of the defendant not only that there was no master-servant relationship at the time of the accident, but also that there was no evidence of negligence on the part of the driver under the circumstances.

As the Court said in the *Babington* case, "negligence would certainly be relative to the need and the occasion; a speed too great at other times is proper in emergencies."

There is no evidence in this case that the driver was operating the Star truck at an excessive speed or in a negligent or careless manner under the circumstances of the situation. The evidence showed that at the place of the alleged accident the Star truck was at a reasonable position on the highway (R. 15, 16) and was moving at about 35 or 40 miles per hour (R. 15) in a manner that was perfectly proper and reasonable during a pursuit of the kind in question. There was no evidence to show that the driver disobeyed any instructions or orders given by the police officer. The driver was ordered to "go after that car." This he did.

If there was any evidence to show that the driver of the Star truck disobeyed some order of the police officer or that the driver operated the truck in a manner that was negligent or reckless under the circumstances with the result that injury was caused to the plaintiff, then no reliance could be placed upon the second ground of defendant's motion for a directed verdict. However, where the alleged accident resulted only from a proper compliance by the driver with the orders of the police officer, the plaintiff should not be entitled to recover even from the driver.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari is not within the requirements of Rule 38 of this Court, that no question of merit is presented by the petitioner, that no error was committed by the Courts below, and that the petition for certiorari should consequently be denied.

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Washington, D. C.,
September 10, 1940.